IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2597 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BUDHIYABHAI SOMABHAI KOLI PATEL

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 2597 of 2004

MR NM KAPADIA for Petitioner No. 1

MR AY KOGJE, LD.AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 12/08/2004

ORAL JUDGEMENT

1. By filing this petition, the petitioner-detenu, has challenged his detention order dated 6.2.2004 passed by the detaining authority under the provisions of the

Gujarat Prevention of Anti-social Activities Act, 1985 ("PASA", for short). The petitioner is detained as a "bootlegger" under PASA. Along with the order, the petitioner has also been served with the grounds of detention.

2. In the grounds of detention, there is a reference about three criminal cases registered against the detenu under the Bombay Prohibition Act. It is alleged that, the petitioner is dealing in country made liquor. After recording subjective satisfaction, and after considering the statements of the witnesses, whose names have not been disclosed to the petitioner, the detaining authority has detained him under PASA. The said detention order is challenged by the petitioner by way of this petition.

3. The learned Advocate for the petitioner has submitted that, the allegation against the petitioner is that, he is dealing in country made liquor, and there are only three criminal cases registered against him for alleged breach of the Bombay Prohibition Act, and that itself is not sufficient for coming to the conclusion that the petitioner is disturbing the public order, and it cannot be said that the petitioner has violated public order, as, at the most, it can be said that there is breach of law and order on the part of the detenu.

4. Learned advocate for the petitioner submitted that, the names of the witnesses are not disclosed by claiming privilege under Section 9(2) of the PASA. It is submitted that, before claiming the privilege under sec.9(2) of the PASA, the authority has not tried to verify about the credentials, character and antecedents of the detenu. It is further submitted that the privilege is claimed in a routine manner and, therefore, without any basis, the authority has tried to withhold the names of witnesses and as a result of that, the petitioner is denied the valuable right of making effective representation. To substantiate his say, learned advocate for the petitioner has relied upon the decision of this Court rendered in the case of KISHOR NAGINBHAI PARMAR v. STATE OF GUJARAT, reported in 2000 (4) GLR 3236, wherein it is held in para 11 as under :

> "11. In this view of the matter, the detaining authority while exercising powers under Section 9 (2) of the P.A.S.A.Act for claiming privilege is expected to consider the general background, character, antecedents, criminal tendency of propensity etc. of the detenu. In the instant

> case, if affidavit or the grounds of detention are considered, all that is recorded by the detaining authority is that the fear expressed by the witnesses is found to be genuine and correct by the detaining authority. The detaining authority has recorded that it has carefully scrutinized, examined and considered all the materials that were produced before him by the sponsoring authority. It is, therefore, clear that the detaining authority, while verifying the statements of the witnesses and while considering the question of exercising privilege under Sec. 9 (2) of the P.A.S.A. Act, has not taken any independent steps for considering general background, character, antecedents, criminal tendency etc. while recording subjective satisfaction, but has relied solely on the material produced by the sponsoring authority. There is no contemporaneous record to indicate the steps taken by the detaining authority and the grounds and reasons for arriving at the subjective satisfaction. It is therefore very difficult to conclude that the detaining authority has considered general background, character, antecedents, criminal tendency and propensity etc. of the detenu while arriving at the subjective satisfaction, for the need of exercise of powers under Sec. 9 (2) of the P.A.S.A. Act and claim privilege by not disclosing identity of the anonymous witnesses."

5. The learned advocate for the petitioner has further submitted that, there is nothing on record to show that the detaining authority has tried to find out the antecedents of the detenu, and thus, it is submitted that there is total non application of mind on the part of the detaining authority while claiming privilege under Section 9(2) of PASA, and therefore, on that ground also, the impugned order is required to be quashed and set aside.

6. The authority has not filed any reply controverting the averments made in the petition. However, the names of the witnesses are not disclosed to the petitioner before exercising such powers under sec.9(2) of the PASA. The authority is required to find out the antecedents of the detenu. In the instant case, there is no reflection in the detention order to point out that the antecedents of the detenu have been taken into consideration at the time of passing the detention order.

7. Mr.Kapadia, learned advocate for the petitioner further submitted that, so far as three registered cases are concerned, it is submitted that the activities of the petitioner may violate law and order and not the public order. In this connection, the learned advocate for the petitioner has relied upon the Division Bench judgment of this Court rendered in L.P.A. No.223/2000, wherein in para 5, it is held that such cases at the most attract law and order and not the public order which reads as under :

"5. If we examine the present case on the anvil of the test which has been applied by the Supreme Court in the case of K.S.Zala v. State of Gujarat (Supra), i.e. with regard to the presence of credible material and as to how the detaining authority has made the mention against the appellant being an obstruction to the public health and public order, we find that in the instant case so far as the statements of the witnesses which were recorded with regard to unregistered cases, that ground has been rejected by the learned Single Judge himself. It is, of course, true that after narrating the particulars of the criminal cases, the detaining authority has mentioned that the activities of the appellant were an obstacle to the public health and public order, but this bald observation cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or public health and that tempo of public life was disturbed. No observation made in any part of the judgement can be read in isolation and bereft the context. The judgement is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the judgement are to be considered in light of the earlier observations made in para 5 where presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order or breach of public health is concerned, credible material has to be there. In the case of K.S.Zala before the Supreme Court, the detaining authority had also relied upon the statements of the witnesses so as to show that violence resorted to by the petitioner in that case had disturbed the even tempo of public life and the material on record

had shown that members of the public of those localities had to run away from there and to go inside their houses and to close their doors. No such fact situation has been mentioned in the present case and the ground with regard to the statements of the three witnesses has been rejected by the learned Single Judge himself and it has been held that there had been violation or infringement of the petitioner's right against such statements. In this view of the matter whatsoever said by the three witnesses with regard to unregistered cases and with regard to the three incidents referred to hereinabove, it cannot be considered to be the material germane for the purpose of consideration of the threat to the public health and public order. Thus, the only material which remains is the registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to the public order and public health. Necessary material in this regard is totally wanting in the body of the detention order itself. In large number of cases, the Supreme Court has considered that involvement in bootlegging activities even if coupled with violence does not amount to threat to public order or public health. The mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health and we find that after giving particulars of criminal cases, the detaining authority by including certain allegations, not supported by any credible material has simply observed that the appellant's activities were an obstacle to the public health and public order. In this view of the matter keeping in view the observations made by the Supreme Court in the case of K.S.Zala v. State of Gujarat (supra) itself in paras 4 and 5, we do not find that it can be held to be a case of breach of public health and public order. Learned counsel for the appellant has also argued several other points before us, but we do not find it necessary to go into those grounds. It may be mentioned that it was not a case of breach of public order or public health and it was not argued before the learned Single Judge. Even if that be so, in such matters, the point which arises on the face of the facts of the case by

> the body of the order itself, which does not require further investigation of the facts, can certainly be allowed to be raised and we allow learned counsel for the appellant to raise this point and find that this point is not without substance. The impugned order passed by the learned single Judge upholding the detention order therefore, cannot be said to be in consonance with the settled position of law. The detention order deserves to be quashed and set aside on this ground alone. We, therefore, do not go into other grounds which were raised on behalf of the appellants."

8. In the instant case, there is nothing on the record to show that the activities alleged to have been committed by the petitioner are such that they affect public order. At the most, the said activities can be said to be in breach of law and order. Even the averments made in the petition are not controverted by the authority by filing any reply. Considering the aforesaid aspect of the matter, and considering the Division Bench judgment, as referred above, since the order of detention is vitiated in view of the fact that the names of the witnesses were not disclosed to the petitioner by claiming privilege under sec.9(2) of the PASA, the petition is required to be allowed on both the grounds.

9. For the foregoing reasons, this petition is allowed. The order of detention dated 6.2.2004 is quashed and set aside. The detenu, Budhiyabhai Somabhai Koli Patel, is ordered to be set at liberty forthwith, if he is not required in connection with any other case.

10. At this stage, learned advocate for the petitioner has submitted that, so far as case No.3 is concerned, the petitioner is not arrested, and at the relevant time, he was absconding. He submitted that the petitioner will not apply for bail upto 30th September, 2004. Learned advocate for the petitioner has further submitted that he is making the statement after taking instructions from the detenu. The said statement is recorded.

11. Mr.Kogje, learned AGP, submitted that, since the petitioner is in habit of repeating the offence, the State may also oppose such application, in case, by this time, the petitioner has moved application for bail, and if he is not released on bail. However, on this aspect, this Court has not expressed any opinion, as it is for

the concerned Magistrate to decide the case on its own merits as and when such bail application is filed. Rule is made absolute to the aforesaid extent.

(P.B. Majmudar, J.)

syed/